SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

NO. 664

RANSBURG ELECTRO-COATING CORP.,

Petitioner,

vs.

IONIC ELECTROSTATIC CORPORATION,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF

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TWENTIETH CENTURY PRESS, INC., CHICAGO 60606

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Three aspects of respondent's brief reinforce the fact that petitioner has been denied due process and denied a fair trial and that applicable decisions of this Court, as well as Rule 52(a), have been violated.

Respondent argues on page 9 of its brief that the conglomeration theory was not a theory of its expert, Dr. Chapman, but a proven fact. There is not one iota of record evidence, other than the unproven raindrop hypothesis of Dr. Chapman, that conglomeration of *sprayed paint* particles occurs. Dr. Chapman was specifically found by the trial court to be one having "no practical experience, or even acquaintance, with commercial electrostatic spray coating", and his testimony was found unacceptable. (Ap. 22, 25) Thus, the Court of Appeals either departed from the record without notice or it relied on the testimony of a discredited witness. Any departure from the record with-

out notice is clearly a denial of due process.[1] The reliance on Dr. Chapman, a witness found unacceptable, is likewise a denial of due process. Such a reliance is the abrogation of an essential safeguard of a fair trial; viz, the formation of a judgment by the trial court as to the credibility of a witness, as was done with Dr. Chapman.

Respondent asserts that petitioner should have rebutted Dr. Chapman's conglomeration theory during its rebuttal case. That assertion overlooks the fact that Dr. Chapman's opinion testimony was totally discredited while he was on the stand as the trial court found.[2] (Ap. 25)

The second notable aspect of respondent's brief is its total failure to point to any justification for the denial of petitioner's motion for new trial. Respondent proffered no evidence to rebut the evidence proffered by petitioner's motion. Respondent does not deny that the proffered evidence would require a material change in the decision of the Court of Appeals.[3] Nor does respondent deny that fairness demands that a new trial be granted. The denial of petitioner's motion for a new trial was a further denial of due process.

The third notable aspect of respondent's brief is its failure to point to any evidence which could justify the setting aside of the trial court's findings as being clearly erroneous. The Court will note that respondent's entire brief, unlike petitioner's brief, consists mainly of evidentiary argument, yet it is written without a single documentation to record evidence. The fact is that the record

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[1] Such a departure contrasts with the Court of Appeals' refusal to permit petitioner to introduce evidence which completely refutes the conglomeration theory.

[2] Respondent in no way attempts to refute the trial court's findings as to Dr. Chapman's lack of credibility.

[3] By respondent's own admission the proffered evidence would require affirmance of the District Court. (See Pet. 18)

does not support respondent's arguments.[4] As petitioner stated (Pet. 11) the Court of Appeals did not hold any finding of the trial to be clearly erroneous.

Respondent's attempt to avoid the *Graver* case by arguing that everything before the trial court was before the Court of Appeals is erroneous on its face. The Court of Appeals did not observe Dr. Chapman, whose testimony was essential to respondent's case and to the Court of Appeals' conclusion that the contempt devices followed the prior art. In the main case, the trial court had personally observed the actual operation of both the patented system and prior art systems and also observed the actual operation of physical exhibits which demonstrated the principles of electrostatic atomization; the Court of Appeals did not. The Court of Appeals' decision clearly violates the *Graver* case.

Respondent is wrong in its argument that petitioner is attempting to invoke the doctrine of res judicata on a method of proof. In the main case the trial court found infringement on the basis of a specific physical operating characteristic, namely smaller spot size measurements. (Ap. 84-85) Such measurements are no different in significance than any other physical characteristic such as structure, composition, shape, or speed. The spot size of the atomized paint particles determines the true character of the accused devices. Thus, when petitioner established that the contempt devices had the same physical operating characteristics as the devices in the main case, res judicata was invoked. As a result, the ultimate fact of infringement merged into the main case.

Respondent argues (Br. 4-6, 10) that the trial court in the main case based its finding of infringement, not on

[4] See Addendum at the end of this brief.

spot size measurements, but rather on other evidence; viz, photographs, a demonstration of the M-50 device and a shielded disc test. That argument is wrong. The fact is that the trial court in its opinion considered spot size measurements independently of the other evidence and, solely on that basis, found infringement. (Ap. 84-85)

The other evidence to which respondent refers was considered by the trial court primarily against the testimony of respondent's experts that centrifugal force eliminated or superseded electrostatic atomization. On that evidence the trial court concluded the electrostatic atomization was not superseded. (Ap. 89) *That evidence was not expressly tied to the holding of infringement, as the spot size evidence was.* But even if the photographic, M-50 and shielded disc evidence could be regarded as relied on by the trial court in holding infringement, the holding based on the spot size evidence would still be res judicata. Professor Moore states at 3923 "a conscious judicial determination that supports the judgment rendered should not be deprived of conclusive effect merely because the court also explores an alternative theory and concludes that it also supports the judgment." *Moore's Federal Practice,* Vol. 1B, pp. 3919-23. The doctrine of res judicata is clearly applicable to the spot size measurements.

Respondent argues that the Court of Appeals' reliance on the prior art as a basis for reversal was independent of its rejection of the spot size measurements and petitioner's other proof of infringement. (Br. 12-13) That argument is also wrong. It was only after the Court of Appeals rejected petitioner's spot size proof of electrostatic atomization (Ap. 7) that it set aside the trial court's findings as to electrostatic atomization and the prior art and held that the "dependence upon the electrostatic forces to atomize the paint is so insubstantial and minimal that it does not exceed the

employment of those same forces in the prior art systems." (Ap. 9) The Court of Appeals conceded that the prior art coating systems did not include electrostatic atomization. (Ap. 8-9) The holding with respect to the prior art was directly dependent on the rejection of petitioner's proofs, and on the acceptance of the discredited Chapman testimony.

Regardless of the viewpoint from which this case is assayed, be it denial of due process, or denial of a fair trial, or disregard of this Court's rulings and Rule 52(a), there is one glaring aspect common to all. That aspect is the Court of Appeals' adoption of Dr. Chapman's testimony as to the very matter on which the trial court found him totally lacking in credibility.

CONCLUSION

Respondent makes light of the application of constitutional guarantees to patent owners. Petitioner is unaware of any authority for affording patent owners something less than due process or something other than a fair trial. There is no doubt that petitioner's constitutional rights as well as applicable decisions of this Court have been violated.

The facts of this case demand the exercise of supervisory authority over the Court of Appeals to rectify a gross injustice.

Respectfully submitted,

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ADDENDUM

Since respondent completely failed to document its evidentiary arguments, thus making it impossible for the Court to check them for their accuracy, petitioner is compelled to enumerate some of respondent's misstatements.

1. Respondent's statement (Br. 8-9) as to why it did not oppose spot size measurements in the main case is sheer fabrication. The spot size measurements in the main case were taken, not at low speeds as stated by respondent, but at normal operating speeds. Both respondent's contention and the purpose of the spot size evidence were exactly the same here as in the main case. The trial court's comments in the main-case decision make it clear that the respondent had vigorously opposed all proofs of infringement. (Ap. 71-85)

2. Respondent's assertion (Br. 9) that Dr. Chapman's theory is "proven scientific fact" is absolutely devoid of record support, as stated previously.

3. Respondent is wrong in its assertion (Br. 9) that the photographs of the contempt devices operating at high speeds showed no electrostatic atomization. The *only* record evidence as to the conclusion to be drawn from such photographs is that at such high rotational speeds the photographic technique was "an inadequate one for distinguishing between electrostatic atomization and mechanical atomization". (Tr. 163)

4. Respondent is wrong in its assertion (Br. 9) that even at low speeds the " 'floating' voltage on the head did not supply enough power" to electrostatically atomize. Petitioner's Exhibits PCXs 14, 27, 35 and 64 show electrostatic atomization at *zero* speed, where the only available atomizing force is the electrostatic field. The testimony

relative to PCX 64 shows that the available power was adequate to effect continuous electrostatic atomization "for as long as I wanted to observe it". (Tr. 1336) The trial court found, based on such evidence, that the electrostatic force was sufficient to atomize. (Ap. 26)

5. Respondent's assertion that the Court of Appeals reversed on the ground that petitioner's proofs were "inferential" (Br. 7, 11) is an invention of respondent. No such reason was stated by that Court.